Supreme Court, U.S.
FILED

No. 00-1282 APR 14 2000

OFFICE OF THE CLERK

In the Supreme Court of the United States

KRISTIN DUPREE,
Petitioner,

v.

JOHN C. BIVONA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A presiding state-court judge granted an *ex parte* application for a post-judgment receivership prior to judgment in direct contravention of controlling case law providing that a court has "no power" to entertain such an application. The judge also failed to ensure that the resulting order provided for the non-discretionary bond mandated by statute.

I. Whether, as held by the Second Circuit, every order signed by a court of general jurisdiction with jurisdiction over the parties is *ipso facto* cloaked with judicial immunity, or should the Second Circuit have considered that a statute or case law expressly prohibiting the court from entertaining the predicate type of application can vitiate immunity as to the resulting order, as this Court stated in *Stump v. Sparkman,* 435 U.S. 349 (1978)?

II. Whether judicial immunity attaches to parts of an order that are ministerial, in the instant case the nonfeasant failure to ensure that there was provision for the non-discretionary receivership bond mandated by statute?

III. Whether the gloss of the Second Circuit on the law of judicial immunity — namely it has imported qualified immunity as an additional defense — is erroneous because judges who act in the "clear absence of all jurisdiction" are necessarily also not entitled to qualified immunity?

PARTIES

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed here appear in the caption of the case.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is not reported and appears in Appendix A hereto at 1a-5a. The decision of United States District Court for the Eastern District of New York is not reported and appears in Appendix B hereto at 6a-11a.

JURISDICTION

The judgment of the Second Circuit was entered on January 14, 2009. In accordance with Rule 13.1 of this Court, this petition is filed within 90 days of the entry of judgment. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Constitutional Provisions

The 14th Amendment, U.S. Const. amend. XIV, cl. 1, provides "nor shall any State deprive any person of life, liberty, or property, without due process of law."

B. Statutory Provisions

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

N.Y. C.P.L.R. Art. 51 is entitled "Enforcement of Judgments and Orders Generally." N.Y. C.P.L.R. 5106 ("Appointment of receiver") provides:

> A court, by or after judgment, may appoint a receiver of property which is the subject of an action, to carry the judgment into effect or to dispose of the property according to its directions. Unless the court otherwise orders, such a receivership shall be subject to the provisions of article sixty-four.

N.Y. C.P.L.R. Art. 64 is entitled "Receivership." N.Y. C.P.L.R. 6401 ("Appointment and powers of temporary receiver") provides:

> (a) Appointment of temporary receiver; joinder of moving party. Upon motion of a person having an apparent interest in property which is the subject of an action in the supreme or a county court, a temporary receiver of the property may be appointed, before or after service of summons and at any time prior to judgment, or during the pendency of an appeal,

where there is danger that the property will be removed from the state, or lost, materially injured or destroyed. A motion made by a person not already a party to the action constitutes an appearance in the action and the person shall be joined as a party.

(b) Powers of temporary receiver. The court appointing a receiver may authorize him to take and hold real and personal property, and sue for, collect and sell debts or claims, upon such conditions and for such purposes as the court shall direct. A receiver shall have no power to employ counsel unless expressly so authorized by order of the court. Upon motion of the receiver or a party, powers granted to a temporary receiver may be extended or limited or the receivership may be extended to another action involving the property.

(c) Duration of temporary receivership. A temporary receivership shall not continue after final judgment unless otherwise directed by the court.

N.Y. C.P.L.R. 6403 ("Undertaking") provides:

A temporary receiver shall give an undertaking in an amount to be fixed by the court making the appointment, that he will faithfully discharge his duties.

STATEMENT OF THE CASE

This case is important because the Second Circuit, although paying lip service to this Court's decisions not so providing, has stated a new rule conferring judicial

immunity for any mandate involving the parties signed by a presiding judge in a court of general jurisdiction.

The instant action seeks damages from a state-court judge for deprivation of civil rights pursuant to 42 U.S.C. § 1983 arising from a patently unlawful emergency receivership order in a contested matrimonial action in which the husband had engaged in malicious conduct and disobeyed court orders. Purportedly to preserve the status quo and effectuate a refinance of the marital residence the judge signed — pre-judgment — an *ex parte* order providing for the post-judgment appointment of the husband receiver of the marital residence with express authority to execute a deed on a patently insufficient showing, pursuant to which authority the husband misappropriated the marital premises the same day as he was appointed and burdened the residence with a bank mortgage. The receivership bond mandated by statute was not provided for in the order.

But for the receivership being denominated a post-judgment receivership no bank would have had a colorable excuse for giving a mortgage to a receiver who had conveyed receivership property to himself. There is no effective remedy on appeal from such an emergency order and the failure to provide for the bond mandated by statue forecloses any meaningful remedy.

The State's highest court has expressly held that a court has "no power" to grant a post-judgment receivership prior to judgment. This Court has stated that the existence of statutory or case law expressly prohibiting the grant of certain relief is an important consideration. The fact that an unauthorized post-judgment receivership is in many respects similar to an authorized provisional receivership does not inform the dispute because it is different in a material respect, namely third parties are not put on notice by acts of self-dealing by a post-

judgment receiver that destroy the status quo, especially in a matrimonial action where the file is sealed.

The unlawful grant of an *ex parte* post-judgment receivership is extraordinary in its potential to cause harm, because it can be used in any action pending in a court of general jurisdiction permanently to deprive any party of any property he owns, regardless of whether ownership of that property is in issue and without any opportunity to be heard or any meaningful redress. A judge who signs such an order without deliberating acts recklessly and is not within the letter or spirit of the doctrine of judicial immunity.

A. Statement of Facts

The parties and other participants

Plaintiff-petitioner Kristin Dupree ("Wife") was at the relevant time the defendant in a contested matrimonial action. Non-party Keith Dupree ("Husband") was at the relevant time the plaintiff in the matrimonial action. Defendant-respondent John C. Bivona is a Justice of the Supreme Court of the State of New York and made a receivership order in the subject matrimonial action.

Course of Proceedings in State Court

At the time the matrimonial action was commenced, the marital premises situated in Southampton and comprising three small cottages on 1/3 acre were titled to husband and wife by the entireties and encumbered by a $113,881.77 first mortgage to one Richard Partington and others. In an order dated February 20, 2003, Judge Bivona ordered Husband to cure any mortgage defaults. Husband was unable to do so, but did not report to the

court that his efforts, if any, had failed. On April 14, 2003, Partington commenced a foreclosure action in the same court as the pending matrimonial action. An order appointing a referee to compute was filed in that action, but no referee's report was filed or confirmed and there is no judgment of foreclosure and sale.

By written stipulation dated October 17, 2003 (the "2003 Stipulation"), Husband and Wife agreed that Husband would buy Wife's interest in the marital residence for $70,000 in cash and a $25,000 mortgage as soon as he could refinance the Partington mortgage with December 17, 2003, being an "outside date."

In November 2003, Husband secured a mortgage commitment from a savings bank for a $145,462.70 mortgage to pay off the Partington mortgage, but after deduction of fees and encumbrances of record the new mortgage did not provide any surplus to purchase Wife's interest. He demanded that Wife convey her interest to him without contemporaneous payment, which she refused.

Husband should have at that point innocently defaulted under the 2003 Stipulation and refinanced the premises in both names, which was his obligation under the order dated February 20, 2003. However, this legitimate course would have jeopardized the husband's objective to have for himself all the equity and appreciation in the premises whether or not he had paid for that right.

Rather than innocently defaulting, Husband made emergency application to Judge Bivona on November 21, 2003, to be appointed post-judgment receiver and made the following sworn assertions: (1) the receivership was needed to "prevent the pending foreclosure sale" in order to effectuate the 2003 Settlement; (2) the purpose of the receivership was to effect a refinance of the marital residence; and (3) Wife could not be paid contemporaneously

as she had demanded because the proceeds would be escrowed for three days, as is customary for a refinance. (App. D at 22a-25a)

This emergency application by Husband was patently defective on four grounds: (1) The court has no power to appoint a post-judgment receiver prior to judgment; (2) There was no provision for the receivership bond mandated by statute; and (3) No deed is required to refinance a residence; and (3) There was no showing that the 2003 Stipulation would be performed as a consequence.

In addition, the court had at its disposal undisputed information of record that showed: (1) There was no "pending foreclosure sale" because there was no judgment of record granting foreclosure and sale; and (2) Husband having disobeyed court orders and engaged in malicious conduct was an inappropriate receiver.

Husband applied for his appointment as receiver *ex parte*. Judge Bivona signed the order to show cause. (App. D at 19a-21a) Using the emergency receivership powers granted in the order, on November 21, 2003 (the same day) Husband, as receiver, conveyed the marital premises to himself personally, encumbered the premises with a $145,462.70 bank mortgage, paid off the Partington mortgage and paid nothing to Wife, thereby extinguishing her interest without compensation.

Wife sought relief from the wrongful taking of her interest. After a series of inconsistent orders and communication from Chambers that reflected an absence of meaningful deliberation and a practice of unlawful delegation of judicial authority to personal assistants, Wife on February 23, 2006, moved in the matrimonial action to disqualify Judge Bivona on grounds of actual bias in part caused by having to address the aftermath of a debacle of his own making and potential liability to Wife

for deprivation of civil rights. Judge Bivona denied the motion; an appeal from his denial was duly taken and perfected.

On November 20, 2006, Wife commenced the instant action against Judge Bivona in the District Court seeking money damages for deprivation of civil rights arising from the non-immune conduct of Judge Bivona in granting a prohibited receivership without mandatory bond, which resulted in the loss of her ownership interest in the marital residence and caused her to incur large counsel fees. A copy of the complaint appears in Appendix C at 12a-18a.

Immediately after being served with the complaint, Judge Bivona disqualified himself from the matrimonial action on the grounds that he had been sued by Wife.

The matrimonial action was shortly thereafter settled and a final judgment of divorce on stipulation entered. The settlement exceeded the 2003 Stipulation by approximately $140,000 and nearly compensated Wife for the wrongful taking of the residence. It reflected the maximum Husband could realistically pay over time based on discovery in that action but did not address the attorneys fees Wife incurred in seeking redress from the unlawful receivership order, namely approximately $75,000.00 to the time the District Court complaint was filed.

B. Course of Proceedings & Decisions Below

Respondent Bivona moved the District Court pursuant to Fed. R. Civ. P. 12(b)(6) for dismissal on four grounds, one of which was judicial immunity. Petitioner Dupree argued, among other things, that judicial immunity did not attach because Judge Bivona acted in the "clear absence of all jurisdiction" because the New York

Court of Appeals held in *Brush v. Jay*, 113 N.Y. 482 (1889), that a judge has "no power" to entertain this type of receivership application prior to judgment and this Court in *Stump v. Sparkman*, 435 U.S. 349 (1978) stated that a statute or controlling case prohibiting the consideration of such relief is "significant" to the analysis. Petitioner further argued that the failure to provide for the mandatory, non-discretionary receivership bond was a non-immune ministerial act.

By order dated October 12, 2007, the District Court granted the motion of Defendant addressing only the question of judicial immunity. The memorandum and order accurately recites the facts and the contentions of the parties and accurately recites general principles. However, it does not address Plaintiff's main argument that jurisdiction to entertain the matter was limited by controlling law or that ministerial components normally performed by clerks are not immune and, therefore, contains no reasoning as to those issues. An appeal was taken to the Second Circuit.

The Second Circuit affirmed on the ground that "the entry of an order in a case over which a judge is presiding is a quintessential judicial act." That is, a judge making an order in such a case is *ipso facto* immune. The Second Circuit also did not address this Court's statement in *Stump v. Sparkman* and did not address that when a judge performs a ministerial act, such as reviewing papers for facial conformity to statute, he is cloaked with the same immunity as a clerk performing a like function, namely no immunity whatsoever.

In addition, the Second Circuit concluded that a judge having subject matter jurisdiction of a dispute *ipso facto* can not — as a matter of law — make an order in the dispute that is in the clear absence of all jurisdiction.

REASONS FOR GRANTING THE WRIT

Summary

Under controlling law, judicial immunity does not attach to acts by judges that are: (1) done in the clear absence of all jurisdiction, or (2) ministerial in nature. Although absence of meaningful deliberation is not an established ground for abrogating judicial immunity, it appears to have played a major role in the matter and is outside the policy reasons for judicial immunity.

The courts below failed to address two pertinent exceptions to the doctrine of judicial immunity that were expressly raised by Petitioner:

(1) Federal courts look to state law to ascertain the nature and extent of the jurisdiction of a state court judge. The New York Court of Appeals has held that a New York judge has "no power" to appoint a post-judgment receiver prior to judgment. The New York Appellate Division has held that a judge who is expressly prohibited from entertaining a matter but nevertheless does so is not immune. Therefore, a state-court judge who unlawfully appoints a post-judgment receiver prior to judgment is not immune from the consequent injury.

(2) A judge performing a judicial act is not immune for attendant ministerial acts. While appointing a receiver is a judicial act, it has ministerial components to which immunity does not attach, such as, for example, checking that there is a prima facie proof of service where same is required, or, as in the instant case, ensuring that the bond that is in all cases mandated by statute is provided for in its mandate.

The Second Circuit, while paying lip service to the rules stated by this Court, has acted as if it is writing on a clean slate. In the instant case, it has articulated a

new rule, namely that an order signed by a presiding judge is *ipso facto* an immune judicial act regardless of content, and reiterated that judges not protected by absolute immunity are nevertheless protected by qualified immunity.

I THE APPOINTMENT OF A POST-JUDGMENT RECEIVER PRIOR TO JUDGMENT CONTRAVENES THE EXPRESS HOLDING OF NEW YORK'S HIGHEST COURT THAT A JUDGE HAS "NO POWER" TO GRANT SUCH A REMEDY, WHICH NECESSARILY MEANS THAT THE OFFENDING ORDER WAS GRANTED IN THE "CLEAR ABSENCE OF ALL JURISDICTION"

A. Judges are generally not immune for acts taken in the clear absence of all jurisdiction

Judicial immunity was created "for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." *Pierson v. Ray*, 386 U.S. 547, 554 (1967). The rule is explored in *Note, What Constitutes a Judicial Act for Purposes of Judicial Immunity?*, 53 Fordham L. Rev. 1503 (1985):

(a) Policy bases for the immunity rule are the need for finality and judicial independence: A judge should not fear private suits over his decisions.

(b) An act is cloaked in judicial immunity if it is a "judicial act" and if it is not performed in the "clear absence of all jurisdiction."

(c) An act is judicial: (1) if it is a function normally performed by a judge, and (2) if the parties dealt with the judge in his judicial capacity

This Court has discussed the doctrine in *Stump v. Sparkman*, 435 U.S. 349 (1978) and *Mireles v. Waco*, 502 U.S. 9 (1991).

Stump v. Sparkman holds that a judge was judicially immune from suit for an *ex parte* sterilization he directed of a mildly retarded young woman, but it also provides:

> But in our view, it is more significant that there was no Indiana statute and no case law in 1971 prohibiting a circuit court, a court of general jurisdiction, from considering a petition of the type presented to Judge Stump.

That is, had there been a state law expressly prohibiting the judge from the subject act the result might have been different. In the instant case, there is such a law.

Stump v. Sparkman was decided by a 5-3 majority. The dissent questioned how so patently outrageous an act could be considered a judicial act.

In *Mireles v. Waco*, the complaint of the attorney-plaintiff alleged that:

> after he failed to appear for the initial call of Judge Mireles' morning calendar, the judge, angered by the absence of attorneys from his courtroom, ordered the police officer defendants to forcibly and with excessive force seize and bring plaintiff into his courtroom. The officers allegedly by means of unreasonable force and violence seize[d] plaintiff and remove[d] him backwards from another courtroom where he was waiting to appear, cursed him, and called

> him vulgar and offensive names, then without necessity slammed him through the doors and swinging gates into Judge Mireles' courtroom.

The Ninth Circuit held that the complaint in *Mireles v. Waco* was sufficient because battery is not a judicial act. This Court in a 6-3 summary reversal applied the rule in *Stump v. Sparkman* as follows: Ordering persons into his courtroom is an act normally performed by a judge; performing such an act in an unlawful way is merely an error or in excess of jurisdiction. Justice Stevens dissented upon the ground that the battery was plainly an independent non-judicial act.

B. New York judges do not have jurisdiction to entertain applications to appoint a post-judgment receiver prior to judgment

If a judge entertains a matter that a law expressly provides a judge or court may not lawfully entertain, then such an act is necessarily — and by definition — done "in the clear absence of all jurisdiction" and is not immune. That is, where a law is directed at the power of a court or judge to entertain a matter rather than at the rights of a party, a judge violates the law at his personal peril. The instant case is one of the rare instances where there is a law expressly depriving a judge of the power to entertain a matter.

The text of the offending part of the emergency receivership order is quite remarkable:

> ORDERED that pursuant to CPLR § 5106 Plaintiff (Husband) is appointed as receiver of Defendant's (Wife's) interest in the residence situate at 4 Lake Side Drive, Southampton, New York for the sole purpose of executing all

> necessary deeds and transfer documents to refinance the residence to prevent the pending foreclosure sale. (App. C at 20a)

The actionable tort was the granting of a post-judgment receivership with the power to convey the property. N.Y. C.P.L.R. 5106 provides (emphasis added):

> § 5106. Appointment of receiver. A court, ***by or after judgment***, may appoint a receiver of property which is the subject of an action, to carry the judgment into effect or to dispose of the property according to its directions. Unless the court otherwise orders, such a receivership shall be subject to the provisions of article sixty-four.

That is, Judge Bivona granted a post-judgment receivership prior to judgment together with the power to convey the marital residence by deed. The disposition of the marital residence had been an ultimate issue in the action. The 2003 Stipulation providing for the disposition of the residence was not so ordered, so it could not be deemed a judgment. The very day he was appointed receiver, Husband used the overbroad powers granted in the appointment to misappropriate the marital premises, rendering academic any right to appeal.

The post-judgment receivership pursuant to N.Y. C.P.L.R. 5106 — as opposed to a *pendente lite* receivership pursuant to N.Y. C.P.L.R. 6401 — was an essential part of the order. Matrimonial files are sealed and Husband's prospective mortgagee had no way to ascertain the propriety of the order to show cause. The prospective mortgagee would have been on notice of an irregularity if the receivership were provisional because the power to execute a deed is extraordinary in a provisional receivership. How-

ever, it is common and regular in a post-judgment receivership.

Brush v. Jay, 113 N.Y. 482 (1889), is the only New York case that squarely addresses this issue. There, the trial court *pendente lite* appointed a receiver with the power to convey the property in issue. Notwithstanding that it is over 100 years old, this New York Court of Appeals case stands as the law of the state that must be considered in determining whether Judge Bivona acted "in the clear absence of all jurisdiction." It holds that a court has "no power" *pendente lite* to appoint a receiver to convey the property the ownership of which is a subject of the action (emphasis added):

> In making the order in question we think the court exceeded its authority. It was manifestly improper to determine a material issue upon affidavits in anticipation of the trial, and the determination of the issues joined, according to the mode prescribed by law. We know of no practice which authorizes a court in this manner to defeat the object of the litigation, and place the subject of the action beyond the power of the court ultimately to award it to those showing title thereto. That question is yet to be tried, and ***the court has no power*** to disable itself in advance from rendering such a judgment in the action as will do justice to the parties.

The New York Court of Appeals did not say that a party has no right to such a receivership. Rather, it said that a court has no power to grant one. In so doing, it identified a clear limitation on the jurisdiction of the New York Supreme Court.

The words "no power" do not mean that a contravening act is merely erroneous. That would be contrary to the plain meaning of the words. Moreover, other pronouncements of the New York Court of Appeals make it clear that "no power" means no jurisdiction over the subject matter. For example, in discussing the writ of prohibition, the New York Court of Appeals has said:

> The extraordinary remedy either of prohibition or mandamus lies only where there is a clear legal right, and in the case of prohibition, only when a court (if a court is involved) acts or threatens to act without jurisdiction in a matter over which it has no power over the subject matter or where it exceeds its authorized powers in a proceeding over which it has jurisdiction.

State v. King, 36 N.Y.2d 59, 62 (1975).

"Clear absence of all jurisdiction" is not just determined based on a legislative grant of jurisdiction; it is also determined on express limitations on jurisdiction. For example, in *LaPier v. Deyo*, 100 A.D.2d 710, 474 N.Y.S.2d 597 (3d Dep't 1984), it was held that a judge otherwise with subject matter jurisdiction who pursuant to statute should have disqualified himself from a case in which his brother was a party was not immune from suit for fraud by his brother's counterparty.[1] That is, where by law a judge is expressly constrained from *en-*

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[1] A judge must disqualify himself in any matter where "he is a party, or in which he has been attorney or counsel, or in which he is interested, or if he is related by consanguinity or affinity to any party to the controversy within the sixth degree." N.Y. Jud. Law § 14.

tertaining a matter, he is not immune if he violates that law. This was also mentioned in *Stump v. Sparkman*. In such a case he acts in the clear absence of all jurisdiction.

Judge Bivona, like the judge in *LaPier v. Deyo,* was by controlling law expressly constrained from entertaining the matter before him. He, therefore, necessarily and by definition acted in the absence of all jurisdiction and is not immune. The absence was "clear" because every judge knows the difference between pre-judgment and post-judgment.

Therefore, the view of the Second Circuit that jurisdiction over any subject matter involving the parties carries over to all matters involving the parties is not supported. In addition, there are many applications for relief that can take the form of motions in existing plenary proceedings or as separate plenary proceedings. Judicial immunity should not depend on the form of the proceeding but on the nature of the act.

C. The Second Circuit's gloss on the law of judicial immunity, namely the importation of the "arguable probable cause" defense, is unsupported and unreasonable

Tucker v. Outwater, 118 F.3d 93 (2d Cir. 1997), and its holding are recited in both decisions below. In that case, citing to *Maestri v. Jutkofsky*, 860 F.2d 50 (2d Cir. 1988), the Second Circuit stated:

> Because scrutiny of a judge's state of mind would hinder the adjudicatory process in the very manner that the judicial immunity doctrine is designed to prevent, a judge will be denied immunity only where it appears, first, that

> the judge acted in the clear absence of jurisdiction, and second, that the judge must have known that he or she was acting in the clear absence of jurisdiction. This test, composed both of an objective element-that jurisdiction is clearly absent, *i.e.*, that no reasonable judge would have thought jurisdiction proper-and of a subjective element-that the judge whose actions are questioned actually knew or must have known of the jurisdictional defect-protects judicial acts from hindsight examination while permitting redress in more egregious cases, such as where a judge knowingly acts outside his territorial jurisdiction.

No authority for this additional defense is stated in *Tucker* or *Maestri* and it appears to have been created by the Second Circuit.

The defense has been seen before and is central to the doctrine of "qualified immunity." As a general rule, the qualified immunity doctrine protects a government official from civil liability, absent the violation of a constitutional right which was "clearly established" at the time. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Under this standard, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he [was] doing violate[d] that right." *Id.* at 640. This qualified immunity doctrine is intended to protect all government officials except those who "are plainly incompetent or knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

It was inappropriate to apply this doctrine. First, qualified immunity is a lesser immunity than absolute immunity. Therefore, if on the merits a judge fails the tests in *Stump* and *Mireles*, he necessarily fails the test in *Tucker*, which is, therefore, superfluous. Second, it is

illogical to apply the doctrine in a case where it is alleged in the District Court record that there was no meaningful deliberation — because a judge who merely rubber stamps a patently defective order handed up by a lawyer is acting recklessly and incompetently.

II. THE FAILURE TO PROVIDE FOR THE MANDATORY RECEIVERSHIP BOND WAS A MINISTERIAL ACT OR OMISSION TO WHICH IMMUNITY DOES NOT ATTACH

It is "the nature of the function performed, not the identity of the actor who performed it," that determines whether an individual is entitled to immunity. *Forrester v. White,* 484 U.S. 219, 229 (1988). It is not always readily apparent whether an act is judicial or ministerial:

> As Prosser has noted, almost any act admits some discretion in the manner of performance, even driving a nail (see Prosser, Torts (4th ed.), § 132, p. 990). Nevertheless, the rule to be derived from the cases is that discretionary or quasi-judicial acts involve the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result.

Tango by Tango v. Tulevech, 61 N.Y.2d 34, 41 (1983).

Judge Bivona failed to provide for a receiver's bond, which is mandatory. N.Y. CPLR 6403 (Undertaking) provides: "A temporary receiver shall give an undertaking in an amount to be fixed by the court making the appointment, that he will faithfully discharge his duties."

The acts of a receiver without bond are usually not void. This does not mean that the order appointing the receiver is not an actionable tort; it just means that the injury is not readily remedied. In the instant case, Petitioner had no effective recourse at law from the unlawful order of Judge Bivona and the taking and liening of her property by an institutional mortgagee — either by appeal pursuant to N.Y. C.P.L.R. 5701 or by appellate review of the *ex parte* order pursuant to N.Y. C.P.L.R. 5704 or by recourse to a receivership bond.[2] The absence of a receivership bond injured Wife and caused her to incur tremendous legal expenses to preserve her rights in the property — necessary because Husband on the matrimonial court record was unable to meet even modest financial obligations.

Judicial immunity attaches to judicial acts, not ministerial ones; Judge Bivona is not immune to suit for his failure to require a receiver's bond. "It is a general rule that a person is not liable to an action, at the suit of an individual, for what he does, or fails to do, as judge, but where he omits a ministerial duty, or errs in its performance, it may be otherwise." *Evarts v. Kiehl*, 102 N.Y. 296 (1886). "[I]mmunity is not accorded to a judicial officer who performs a ministerial act so as to injure another." *Sassower v. Finnerty*, 96 A.D.2d 585 (2d Dep't 1983). "Ministerial acts performed by a judicial officer are not subject to absolute immunity, and the mere act of issuing process can, in certain circumstances, be viewed as a

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[2] Wife sought judicial relief against Husband and his transferees in a plenary non-matrimonial proceeding pending in state court but there was no assurance that complete relief could be secured there. Husband lacked financial resources and the mortgagees have legal defenses.

ministerial act." *Lombardoni v. Boccaccio*, 121 A.D.2d 828 (3d Dep't 1986).

> These same policy considerations (concerning discretionary acts) do not apply to ministerial acts, and cannot be permitted to cloak the negligent performance of a ministerial task requiring no judgment of discretion. A "ministerial" act is by definition not a "judicial" act and should not be protected. The New York Courts that have examined this narrow issue have concluded that the doctrine of judicial immunity does not apply to purely ministerial acts.

Scott v. City of Niagara Falls, 95 Misc.2d 353 (Sup.Ct. Niagara Co. 1978); see, generally, 28 NY Jur 2d, *Courts & Judges* § 91.

The exception to immunity for ministerial acts applies to judges. In *Luckie v. Goddard*, 171 Misc. 774 (Sup.Ct. Monroe Co. 1939), it was held that a police justice was not immune for the misstatements of fact that he made in his certificate to the commissioner of motor vehicles under the Vehicle and Traffic Law because this was the performance of a ministerial duty rather than a judicial one. The court observed (citations omitted):

> It is well established that a justice of the peace in making a return upon appeal acts ministerially and is responsible to the party injured for negligence therein, where the error was in stating the amount of the judgment; where the return failed to set forth the refusal of the justice to admit certain testimony which it was contended constituted reversible error. . . . [A] justice of the peace was held liable for damages resulting from his mistake in entering in his docket a judgment as in favor of the defendant

> and against the plaintiff instead of in favor of the plaintiff against the defendant.

As to federal case law, the Second Circuit in *Huminski v. Corsones,* 396 F.3d 53 (2d Cir. 2004), held that (citations and internal quotes omitted):

> A judge is not protected under the doctrine of judicial immunity, however, if the action in question is not judicial in nature, as when the judge performs an administrative, legislative, or executive act. To conclude that, because a judge acts within the scope of his authority, such . . . decisions are brought within the court's jurisdiction, or converted into judicial acts, would lift form above substance. Instead, the factors determining whether an act by a judge is a judicial one relate to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity.

As regards the mandatory receivership bond, checking papers for such matters as motion timing, proof of service, and mandatory undertakings is a clerical function and is not usually performed by judges. Such checking is a ministerial function because it does not require any discretion whatsoever. Accordingly, a judge who performs them is not immune if he performs them badly.

In the instant case, had Judge Bivona provided for the mandatory bond, but set it too low, that would have been an abuse of discretion and immune. However, by failing to provide for any bond, Judge Bivona failed to adhere "to a governing rule or standard with a compulsory result." Whereas deciding a receivership application is a judicial act, checking for the mandatory bond is a clerical

act. As for the first branch of the *Stump v. Sparkman* test, it is fair to say that parties do not expect a judge to perform a preliminary clerical review of papers. Accordingly, if he does such a review improperly — as must be assumed to be the case on this motion to dismiss — the judge should not be immune.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

KENNETH COOPERSTEIN
54 Harbor Park Drive
Centerport, New York 11721
(631)754-7777
Counsel of Record and Attorney for Petitioner Dupree

April 13, 2009

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Appendix A

ORDER OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT DATED JANUARY 14, 2009

07-4599-cv
Dupree v. Bivona

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to summary orders filed after January 1, 2007, is permitted and is governed by this court's Local Rule 32.1 and Federal Rule of Appellate Procedure 32.1. In a brief or other paper in which a litigant cites a summary order, in each paragraph in which a citation appears, at least one citation must either be to the Federal Appendix or be accompanied by the notation: "(summary order)." A party citing a summary order must serve a copy of that summary order together with the paper in which the summary order is cited on any party unless the summary order is available in an electronic database which is publicly accessible without payment of fee (such as the database available at http://www.ca2.uscourts.gov/). If no copy is served by reason of the availability of the order on such a database, the citation must include reference to that database and the docket number of the case in which the order was entered.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, at 500 Pearl Street, in the City of New York, on the 14th day of

Appendix A

January, two thousand nine.

Present: HON. RALPH K. WINTER, HON. ROBERT A. KATZMANN, HON. REENA RAGGI, *Circuit Judges.*

KRISTIN DUPREE,
Plaintiff-Appellant,
v. No. 07-4599-cv-v
JOHN C. BIVONA,
Defendant-Appellee.

For Plaintiff-Appellant:

KENNETH COOPERSTEIN,
Centerport, N.Y.

For Defendant-Appellee:

RICHARD OWEN JACKSON, Assistant Solicitor General (Barbara D. Underwood, Solicitor General, Richard Dearing, Assistant Solicitor General, on the brief) for Andrew M. Cuomo, Attorney General of the State of New York, New York, N.Y.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Plaintiff-appellant Kristin Dupree appeals from a judgment of the United States District Court for the Eastern District of New York (Wexler, J.) dated October 12, 2007, dismissing her complaint pursuant to Fed. R. Civ. P. 12(b)(6). We assume the parties' familiarity with the underlying facts and procedural history of the case.

Appendix A

We review a district court's decision granting a motion to dismiss pursuant to Rule 12(b)(6) de novo, "construing the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." *Goldstein v. Pataki*, 516 F.3d 50, 56 (2d Cir. 2008) (internal quotation marks omitted). The complaint must allege facts sufficient "'to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true.'" Id. (quoting *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007) (citation omitted)).

Dupree brought this civil rights action, pursuant to 42 U.S.C. § 1983, seeking money damages against defendant-appellee John C. Bivona, a Justice of the Supreme Court of the State of New York. The complaint alleges that Justice Bivona, who was presiding over Dupree's divorce proceedings, violated Dupree's Fourteenth Amendment rights by entering an order of receivership without requiring the appointed receiver, Dupree's then-husband, to post a bond. Justice Bivona moved to dismiss on the ground that he is entitled to absolute judicial immunity because the order of receivership was a judicial act entered in a matter over which he had jurisdiction.

Judges are "immune from liability for damages under many circumstances." *Huminski v. Corsones*, 396 F.3d 53, 74 (2d Cir. 2005). Judicial immunity, however, does not extend to acts that are "not judicial in nature," viz. not within the judge's judicial capacity, *id.* at 75, or to judicial acts that are "taken in the complete absence of all jurisdiction." *Mireles v. Waco*, 502 U.S. 9, 12 (1991); see also *Tucker v. Outwater*, 118 F.3d 930, 936

(2d Cir. 1997) ("A judge will be denied immunity for damages where he (i) acts in the clear absence of all jurisdiction; and (ii) knew or must have known that he was acting in such a manner."). In determining whether an act is judicial in nature, we examine whether (1) that act is one normally performed by a judge, and

(2) the parties were dealing with the judge in his or her judicial capacity. *Stump v. Sparkman*, 435 U.S. 349, 362 (1978); *Huminski*, 396 F.3d at 75.

Although there may be cases in which it is difficult to discern whether a judge was acting in his or her judicial capacity, this is not one of them. Here, Justice Bivona plainly acted in a judicial capacity. The purportedly nonjudicial act identified by Dupree is Justice Bivona's entry of an order of receivership in her divorce proceedings. The entry of an order in a case over which a judge is presiding is a quintessential judicial act. See *Mireles*, 502 U.S. at 13 ("[W]e look to the particular act's relation to a general function normally performed by a judge . . . ."). Moreover, it is beyond dispute that Justice Bivona performed this act while dealing with Dupree and her then-husband as parties in their matrimonial action.

Dupree's argument that Justice Bivona is not entitled to immunity because he acted "in the clear absence of all jurisdiction" similarly is to no avail. This argument is predicated on Dupree's belief that Justice Bivona had "no power" to enter an order of receivership pursuant to N.Y. C.P.L.R. 5106. It is of no moment, however, that Justice Bivona might have exceeded his authority when he entered the order of receivership, although we express no view on the merits of this point. Rather, the inquiry for purposes of judicial immunity fo-

cuses on whether Justice Bivona "had jurisdiction over the subject matter before him" at the time he entered the order. *Stump*, 435 U.S. at 356; see also id. at 356-57 & n.7 (discussing the distinction between "lack of jurisdiction and excess of jurisdiction"). Justice Bivona had subject-matter jurisdiction over Dupree's matrimonial action as a consequence of the fact that the Supreme Court of the State of New York is a court of general jurisdiction. Consequently, even if Justice Bivona acted in error or exceeded his authority when he entered the receivership order, that error would not be sufficient to deprive him of judicial immunity. See *id.* at 356; *Mireles*, 502 U.S. at 12-13 ("If judicial immunity means anything, it means that a judge will not be deprived of immunity because the action he took was in error . . . or was in excess of his authority.") (internal quotation marks omitted); *Tucker*, 118 F.3d at 936.

We have considered Dupree's remaining arguments and find them to be without merit. Accordingly, the judgment of the district court is hereby **AFFIRMED**.

FOR THE COURT:
CATHERINE O'HAGAN
WOLFE, CLERK

By:

_____

Appendix B

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED NOVEMBER 12, 2007

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X		CV-06-6190
KRISTIN DUPREE,	:	(Wexler, J.)
	:	
Plaintiff,	:	**MEMORANDUM**
	:	**& ORDER**
-against-	:	
	:	
JOHN C. BIVONA,	:	
	:	
Defendant.	:	
----------X		

APPEARANCES:

KENNETH COOPERSTEIN, ESQ.,
Attorney for Plaintiffs
54 Harbor Park Drive
Centerport, NY 11721

ANDREW M. CUOMO, ATTORNEY GENERAL OF THE STATE OF NEW YORK, BY: PATRICIA M. HINGERTON, ESQ., ASSISTANT ATTORNEY GENERAL,
Attorney for Defendant
300 Motor Parkway, Suite 205
Hauppauge, NY 11788

Appendix B

WEXLER, District Judge.

This is a case alleging a civil rights cause of action pursuant to 42 U.S.C. § 1983. Named as the Defendant is John C. Bivona, a Justice of the Supreme Court of the State of New York ("Justice Bivona"). Justice Bivona is alleged to have denied Plaintiff of her civil rights when he entered an order of receiver-ship in connection with Plaintiff's divorce action. Presently before the court is Justice Bivona's motion, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss. Dismissal is sought on the grounds of absolute judicial immunity, the Rooker-Feldman doctrine, the Eleventh Amendment and the domestic relations exception to federal jurisdiction. For the reasons set forth below, the motion is granted.

BACKGROUND

I. The Divorce Action and the Allegations of the Complaint

This case arises out of a divorce proceeding presided over by Justice Bivona. The divorce proceeding was commenced in October of 2002 by Keith Dupree, Plaintiff Kristin Dupree's now ex-husband. Plaintiff's complaint alleges that in the course of the divorce action, Keith Dupree presented an emergency application to Justice Bivona seeking to be appointed temporary receiver in connection with the refinancing of the marital residence. Keith Dupree's application for the receivership is alleged to have contained false statements regarding his intentions with respect to the property. Upon the granting of the receivership, Keith Dupree is alleged to have conveyed the marital residence to himself, encumbered the property with a mortgage and paid nothing to Plaintiff.

Appendix B

Justice Bivona is alleged to have appointed Keith Dupree as temporary receiver without requiring the posting of a bond. It is also alleged that Plaintiff's attorney was not given proper notice of the application. The appointment of Keith Dupree as temporary receiver without requiring a bond is alleged to be contrary to law and "in the clear absence of jurisdiction."

DISCUSSION

I. Standard For Motion To Dismiss

In *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007), the Supreme Court rejected the "oft-quoted" standard set forth in *Conlev v. Gibson*, 355 U.S. 41, 78 (1957), that a complaint should not be dismissed, "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 45-46.The court discarded the "no set of facts" language in favor of the requirement that plaintiff plead enough facts "to state a claim for relief that is plausible on its face." *Bell Atlantic Corp.*, 127 S.Ct. at 1974.

The "plausibility" language used by the Supreme Court in *Bell Atlantic*, has not been interpreted by the Second Circuit to require a "universal standard of heightened fact pleading," but to require a complaint to "amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible." *Iqbal v. Hasty*, 490 F.3d 143, 158 (2d Cir. 2007) (emphasis in original). Further, courts have noted that while heightened factual pleading is not the new order of the day, Bell Atlantic holds that a "formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level, on the as-

sumption that all the allegations in the complaint are true (even if doubtful in fact)." *Williams v. Berkshire Fin. Grp. Inc.*, 491 F.Supp.2d 320, 324 (E.D.N.Y.2007), quoting, *Bell Atlantic Corp.*, 127 S.Ct. at 1959.

In the context of a motion to dismiss, this court must, as always, assume that all allegations set forth in the complaint are true and draw all inferences in favor of the non-moving party. *Watts v. Services for the Underserved*, 2007 WL 1651852 *2 (E.D.N.Y. June 6, 2007). The court must ensure, however, that the complaint sets forth "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp.*, 127 S.Ct. at 1974. While a Rule 12 motion is directed only to the sufficiency of the pleading, the court determining the motion may rightfully consider written documents attached to the complaint as well as documents incorporated thereto by reference and those of which plaintiff had knowledge and relied upon in commencing her lawsuit. See *Brass v. Amer. Film Techn., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993); *Watts*. 2007 WL 1651852.

II. Judicial Immunity

Judges are absolutely immune from suit for any actions taken within the scope of their judicial responsibilities. *Stump v. Sparkman*, 435 U.S. 349, 356-67 (1978); *Tucker v. Outwater*, 118 F.3d 930, 932 (2d Cir. 1997); *Miller v. Nassau*, 467 F.Supp.2d 308, 312 (E.D.N.Y. 2006); *Sharp v. Bivona*, 304 F.Supp.2d 357, 363 (E.D.N.Y. 2004); see *Mireles v. Waco*, 502 U.S. 9, 9-12 (1991); *Maestri v. Jutkofsky*, 860 F.2d 50, 52-53 (2d Cir. 1988). This immunity has been held applicable to actions brought pursuant to 42 U.S.C. § 1983. *Tucker*, 118 F.3d at 933. Absolute immunity exists even where the judicial officer is accused of acting in error, mali-

ciously or in excess of his authority. *Root v. Liston*, 444 F.3d 127, 132 (2d Cir.2006); *Tucker*, 118 F.3d at 933; *Lewittes v. Lobis*, 2004 WL 1854082 *3 (S.D.N.Y. 2004), quoting, *Pierson v. Ray*, 386 U.S. 547,554 (1967). The doctrine applies "however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff." *Id.*, quoting, *Bradley v. Fisher*, 80 U.S. 335, 347 (1871).

Judicial immunity is defeated only if: (1) the action is non-judicial, i.e., not taken in the judge's judicial capacity; or (2) the action, although judicial in nature, is performed in the complete absence of all jurisdiction. *Mireles*, 502 U.S. at 11-12; *Tucker*, 118 F.3d at 933; *Miller*, 467 F.Supp.2d at 312. The latter ground has both an objective and subjective component. Thus, it must be shown: (1) that no reasonable judge would have thought jurisdiction was proper and (2) that the judge actually knew or must have known of the jurisdictional defect. *Tucker*, 118 F.3d at 934; *Lewittes v. Lobis*, 2004 WL 1854082 *6 (S.D.N.Y. 2004). There is a difference between acting "in excess of jurisdiction," and acting "in the clear absence of jurisdiction over the subject matter." See *Tucker*, 118 F.3d at 333. A judge "is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors." *Tucker*, 118 F.3d at 333.

III. The Claim Against Justice Bivona Is Barred by Judicial Immunity

There is no question that all allegations set forth in Plaintiffs' complaint fall squarely within the doctrine of judicial immunity. The allegations of wrongdoing relate solely to the decisions of Justice Bivona in connection with the Dupree divorce, a matter over which Plaintiff

makes clear Justice Bivona was pre-siding. Statements in the complaint that Justice Bivona acted either maliciously or corruptly do nothing to overcome judicial immunity. Plaintiff makes no allegation that can be construed to allege either non-judicial acts or that any act was undertaken in the absence of jurisdiction. Under these circumstances, the complaint against Justice Bivona must be dismissed on the ground of judicial immunity and the court need not address the various other grounds urged in support of the motion to dismiss.

CONCLUSION

Defendant's motion to dismiss the complaint is granted. The Clerk of the Court is directed to terminate the motion and to close the file in this case.

SO ORDERED

/s

LEONARD D. WEXLER,
UNITES STATES DISTRICT
JUDGE

Central Islip, New York
October 12, 2007

Appendix C

DISTRICT COURT COMPLAINT DATED NOVEMBER 20, 2006

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

KRISTIN DUPREE,	:	CV-06-6190(LDW/WDW)
Plaintiff,	:	**COMPLAINT**
-against-	:	
JOHN C. BIVONA,	:	**JURY TRIAL DEMANDED**
Defendant.	:	

Plaintiff Kristin Dupree complaining of the defendant John C. Bivona respectfully alleges:

1. This is an action for damages for deprivation of civil rights. It arises under the United States Constitution, particularly under the provisions of the Fourteenth Amendment to the Constitution of the United States, and under federal law, particularly 42 U.S.C. § 1983.

JURISDICTION AND VENUE

2. This Court has original jurisdiction of the above-entitled action pursuant to 28 U.S.C. § 1343.

3. Venue is properly laid in the Eastern District of New York pursuant to 28 U.S.C. sec. 1391(b), because acts and transactions complained of herein occurred in

this district and because the defendant resides and works in this district.

4. This Court has jurisdiction over the person of defendant because he is present in the State of New York.

STATEMENT OF FACTS

The parties & other actors

5. Plaintiff Kristin Dupree resides in the Town of Southampton, County of Suffolk and State of New York.

6. Keith Dupree resides in the Town of Southampton, County of Suffolk and State of New York. He is married to Kristin Dupree.

7. On or about October 21, 2002, Keith Dupree commenced an action for divorce ("Matrimonial Action") against Kristin Dupree in the Supreme Court of the State of New York, County of Suffolk (hereinafter the "Matrimonial Court"), styled Dupree v. Dupree, Index No. 02-28572.

8. Defendant John C. Bivona has at all times relevant been the judge duly assigned to the Matrimonial Action and is a resident of the State of New York.

Course of Matrimonial Action

9. The complaint in the Matrimonial Action alleges cruelty based on adultery and prays for a divorce. An answer was served on or about January 16, 2003. It contains denials and counterclaims for constructive abandonment and cruelty and prays for a divorce.

10. At the time the Matrimonial Action was commenced, the marital premises -- situated in Southamp-

ton and comprising three small cottages on 1/3 acre -- were titled to Keith Dupree and Kristin Dupree by the entireties and encumbered by a $113,881.77 first mortgage to Richard Partington and others. In its order dated February 20, 2003, the Matrimonial Court ordered Keith Dupree to cure any mortgage defaults. Keith Dupree was unable to do so, but did not report to the Matrimonial Court that his efforts, if any, had failed. On April 14, 2003, Partington commenced a foreclosure action.

11. On October 3, 2003, an order appointing a referee to compute was filed in the action to foreclose the Partington mortgage, but no referee's report was filed or confirmed and there was no judgment of foreclosure and sale.

12. By written stipulation in the Matrimonial Action dated October 17, 2003 (the "2003 Stipulation"), Keith Dupree and Kristin Dupree agreed that Keith Dupree would buy Kristin Dupree's interest in the marital residence for $70,000 in cash and a $25,000 mortgage as soon as he refinanced the Partington mortgage -- with December 17, 2003, being an "outside date."

13. In November 2003, Keith Dupree secured a mortgage commitment from Emigrant Savings Bank for a $145,462.70 mortgage to pay off the Partington mortgage, but -- after deduction of fees and encumbrances of record -- the new mortgage did not provide any surplus to purchase Kristin Dupree's interest.

14. Keith Dupree should have at that point innocently defaulted under the 2003 Stipulation and refinanced the premises in both names, which was his obligation under the order dated February 20, 2003. However, this legitimate course would have jeopardized his

objective to have for himself all the equity and appreciation in the premises -- whether or not he had paid for that right.

15. Rather than innocently defaulting, Keith Dupree made emergency application to the Matrimonial Court on November 21, 2003, to be appointed temporary receiver without bond and made the following representations: (1) the receivership was needed to "prevent the pending foreclosure sale" in order to effectuate the 2003 Settlement; (2) the purpose of the receivership was to effect a refinance of the marital residence; and (3) Kristin Dupree could not be paid contemporaneously as she had demanded because the proceeds would be escrowed for three days, as is customary for a refinance.

16. These representations were false, as follows: (1) There was no "pending foreclosure sale" because there was no judgment granting foreclosure and sale; (2) There would be no effectuation of the 2003 Stipulation because with mathematical certainty there would not be so much as one cent left over from the proceeds of the $145,462.70 Emigrant mortgage to purchase the interest of Kristin Dupree pursuant to the 2003 Stipulation; and (3) the contemplated financing was not a refinance at all but a new mortgage without any escrow period.

17. The attorney for Kristin Dupree -- Raymond Voorhees -- was given a few hours' notice of the emergency application but was duly engaged in jury duty and was unable to appear at the time set by counsel for Keith Dupree.

18. Notwithstanding that counsel for Kristin Dupree was engaged, defendant Bivona nevertheless signed the order to show cause granting the emergency receivership. Using the emergency receivership powers

granted in the order, on November 21, 2003 (the same day) Keith Dupree as receiver conveyed the marital premises to himself personally, encumbered the premises with the $145,462.70 Emigrant mortgage and paid nothing to Kristin Dupree -- thereby embezzling her interest.

19. Residential property values in Southampton experienced an extraordinary upward climb starting in the third quarter of 2003. As a consequence of this appreciation, the marital premises today have a market value of approximately $550,000.00.

AS AND FOR A FIRST CLAIM
(Deprivation of Civil Rights)

20. As a direct consequence of Keith Dupree's exercise of the powers granted under the receivership order, Kristin Dupree lost her equity in the marital residence, today valued at $210,000.00.

21. As a direct consequence of Keith Dupree's exercise of powers granted under the receivership order, Kristin Dupree incurred and continues to incur legal expenses in the Matrimonial Action to redress the conversion of the marital residence by Keith Dupree, currently in the amount of $75,000.00.

22. The receivership order was unlawful because it did not provide for the mandatory bond, because it was based on patently insufficient evidence, because Keith Dupree was not a fiduciary approved by the N.Y. Office of Court Administration, and because the extraordinary powers granted were not necessary to accomplish the stated objective.

23. Kristin Dupree had no adequate or meaningful

avenues for the judicial review of the unlawful order.

24. Defendant Bivona acted in the clear absence of all jurisdiction when he appointed a receiver without bond.

25. A receivership bond being mandatory, defendant Bivona's failure to provide for one was a ministerial act.

26. Defendant Bivona acted deliberately or recklessly in failing to provide for adequate and reasonable notice to Plaintiff of the emergency application.

27. Defendant Bivona's grant of the receivership order without bond and the other above-described unlawful acts were so outrageously arbitrary as to constitute a gross abuse of governmental authority.

28. Each of the acts of Defendant was done by him under color and pretense of the statutes, ordinances, regulations, customs and usages of the State of New York.

29. Each of the acts of Defendant was done by him without lawful justification, probable cause or warrant.

30. The conduct of Defendant deprived Plaintiff of the following rights, privileges and immunities secured to her by the Constitution of the United States: The right of plaintiff not to be deprived of life, liberty, or property without due process of law, and the right to the equal protection of the laws, secured by the Fourteenth Amendment to the Constitution of the United States.

31. The aforesaid conduct injured Plaintiff in that it caused her the loss of her interest in the marital residence and to incur substantial legal fees in the Matrimonial Action.

32. The acts, conduct, and behavior of Defendant were performed knowingly, intentionally, and maliciously, by reason of which Plaintiff is entitled to an award of punitive damages.

33. As a result of the unlawful actions of Defendant, Plaintiff has been required to hire an attorney and has incurred and will further incur sizable attorney's fees.

WHEREFORE Plaintiff prays for judgment against Defendant as follows:

(a) General damages in the amount of $285,000.00;

(b) Punitive damages in the amount of $855,000.00;

(c) For the reasonable costs and expenses of this action, including reasonable attorneys fees; and

(d) For such other and further relief as to the Court may seem just and proper.

Dated: Centerport, New York
November 20, 2006

s/ Kenneth Cooperstein
KENNETH COOPERSTEIN
(KC-3761)
Attorney for Dupree
54 Harbor Park Drive
Centerport, NY 11721
(631)754-7777

Appendix D

ORDER OF THE NEW YORK SUPREME COURT DATED NOVEMBER 21, 2003, GRANTING EMERGENCY APPLICATION FOR PROVISIONAL APPOINTMENT OF POST-JUDGMENT RECEIVER AND APPLICATION UPON WHICH IT WAS BASED

At a Special Term, Part II, of the Supreme Court of the State of New York, held in and for the County of Suffolk, at the Courthouse thereof located at 400 Carleton Avenue, Central Islip, New York, on the 21st day of November, 2003.

P R E S E N T :
HON. JOHN C. BIVONA, J.S.C

----------X

KEITH DUPREE,	:	Index # 02-28572
	:	
Plaintiff,	:	**ORDER TO SHOW CAUSE**
	:	
-against-	:	
	:	
KRISTIN DUPREE,	:	
	:	
Defendant.	:	

----------X

Upon reading and filing the annexed affirmation of Karyn A. Villar, ESQ., affirmed the 21st day of November, 2003, and upon all the pleadings and proceedings heretofore had herein,

Appendix D

LET the Defendant, KRISTIN DUPREE, or her attorney, show cause before this Court at an IAS Term, Part 2, thereof to be held in the Supreme Court of the State of New York, Suffolk County, 400 Carleton Avenue, Central Islip, New York, 11722, on the 25th day of November, 2003, at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, why an order should not be made and entered herein granting the Plaintiff, KEITH DUPREE, the following relief:

1. An order pursuant to CPLR § 5106 appointing Plaintiff as receiver of Defendant's interest in the residence situate at 4 Lake Side Drive, Southampton, New York for the sole purpose of executing all necessary deeds and transfer documents to refinance the residence to prevent the pending foreclosure sale;

2. An award of Plaintiff's interim counsel fees in the amount of $1,500.00 with leave to apply for more should same be warranted; and

3. For such other and further relief as this Court deems just and proper.

SUFFICIENT reason appearing therefore, it is

ORDERED that pursuant to CPLR § 5106 Plaintiff is appointed as receiver of Defendant's interest in the residence situate at 4 Lake Side Drive, Southampton, New York for the sole purpose of executing all necessary deeds and transfer documents to refinance the residence to prevent the pending foreclosure sale; and it is further

ORDERED that service by regular mail of a copy of this Order together with the papers upon which it is based, upon Defendant's attorney, OLIVER RAY VOORHEES, III, ESQ., or by facsimile, on or before 21st day of

Appendix D

November, 2003, be deemed good and sufficient service thereof.

ENTER,

s/ John C. Bivona
J.S.C.

GRANTED
NOV 21 2003
Edward P. Romaine
Clerk of Suffolk
County

Appendix D

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

KEITH DUPREE,	:	Index # 02-28572
	:	
Plaintiff,	:	**AFFIRMATION**
	:	**IN SUPPORT**
-against-	:	
	:	
KRISTIN DUPREE,	:	
	:	
Defendant.	:	

STATE OF NEW YORK)
ss.:
COUNTY OF SUFFOK)

KARYN A. VILLAR, ESQ., an attorney duly licensed to practice law before the Courts of the State of New York, affirms the following under penalties of perjury:

1. I am a partner at the law office of DOROTHY A. COURTEN, ESQ., counsel for the above named Plaintiff, and make this affirmation in support of his within application seeking immediate relief.

2. The parties entered an oral stipulation of settlement before this Court on the 17th day of October, 2003, wherein the Plaintiff was to immediately refinance the marital residence situate at 4 Lake Side Drive, Southampton, New York, as the house is in foreclosure status, and the Plaintiff was to buy out Defendant's interest concurrently therewith. The parties agreed Plaintiff would satisfy Defendant's income tax judgments and

liens on the house.

3. The refinance is scheduled for November 21, 2003, at 3:00 p.m.; and the Defendant and her attorney refuse to execute the necessary transfer documents and deeds to effectuate said refinance.

4. As counsel should be aware, as this is a refinance the proceeds aren't available for at least three days, so the money is not available "at the table". In the customary course of business, the title company holds the title and transfer documents, until the money is available.

5. The defendant is to receive the sum of $70,000.00, and a $25,000.00 mortgage would be held.

6. The Plaintiff is now being forced to pay additional fees for interest, penalties, etc., not only for the mortgage and the Defendant's personal debts.

7. Further, Plaintiff is being forced to incur necessary counsel fees for this instant application, plus additional counsel fees for his real estate attorney.

9.[sic] Under the facts and circumstances of this case, it would appear patently unfair to require the Plaintiff to bear the cost of counsel fees necessitated solely by the Defendant's failure to comply with the parties' stipulation. Had Defendant so complied, the subject proceeding would not have been brought and the Plaintiff would not have been faced with incurring these necessary counsel fees.

10. On application for attorney fees, the Court must consider the difficulty of the question involved; the skill required to handle the problem, the time and labor required; the lawyer's ability and reputation; the customary fee charged by the Bar for similar services; and the

amount involved. *Matter of Potts* 213 A.D.2d 59, 209 N.Y.S.2d 925, aff'd 241 N.Y. 593 (1925); *Matter of Ury* 108 A.D.2d 816, 485 N.Y.S.2d 329 (2nd Dept, 1985).

11. An award of counsel fees is left to the sound discretion of the Court. DRL 237, *DaCabrera v. Cabrera-Rosete* 70 N.Y.2d 879. The Plaintiff has been compelled to incur additional legal costs in what should have been a non-complex matter. The equities in this case require that the Defendant be directed to immediately pay the interim fees of $1,500.00 on behalf of the Plaintiff, with leave to apply for more should Defendant's disobedience continue to impede the rights of the Plaintiff.

12. Your deponent respectfully submits that the Plaintiff's instant application is indeed meritorious and necessitated only by the willful misconduct of the Defendant. With respect to the instant proceeding, your affiant has performed and will perform the following legal services; conferencing and consultation with the Plaintiff; attention to and preparation of the Order to Show Cause, your deponent's Affirmation, and the service of the motion papers upon the Defendant, Your deponent anticipates further attention will be required to respond to the Defendant's opposition papers.

13. Your deponent is a member of the Suffolk County Bar Association, Suffolk County Women's Bar Association, and admitted to practice in both New York State and the State of Arizona. Your deponent has practiced, almost exclusively, matrimonial and family law for over 8 years. This office bills its clients for work performed by myself at a rate of $275.00 per hour.

14. Dorothy A. Courten, Esq., is a matrimonial attorney with over 95% of her practice devoted to matrimonial and family law matters since 1991. She is a

member of the Suffolk County Bar Association and the Suffolk County Women's Bar Association, as well as belonging to the matrimonial and family law committees of each. She remains current on changes in applicable law by regularly attending CLE sponsored by the Suffolk County Bar Association, and is current in her CLE requirements; subscribes to Peter Sereduke's Matrimonial Citator, the Family Law Reporter, New York Law Journal, Law Desk research system as well as to other online law services. Ms. Courten is a frequent guest speaker for special interest groups, on issues common to matrimonial and family law, as well as a regular participant in "career awareness day" for several local school districts. She is certainly no stranger to this court, settling before trial approximately 90% of all cases taken on by this firm. Her hourly rates are commensurate with her experience and skills, to wit: $350.00 per hour.

15. There have been no prior applications seeking the relief requested herein.

WHEREFORE, it is respectfully requested that the Plaintiff's motion be granted in its entirety and for such other and further relief.

Dated: November 21, 2003
Hauppauge, New York

s/
Karyn A. Villar

Appendix D

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